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Ben Kempinent

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Problem-Solving Courts and the Defense Function: The Wisconsin Experience

BEN KEMPINEN*

Problem-solving courts have emerged as one of the fastest growing innovations in the criminal justice system. Their growth has not been without controversy, given their dramatic departure from a traditional adversary model in favor of a collaborative approach in dealing with offenders with serious alcohol or substance abuse, or mental health issues. The most outspoken criticism of this approach has come from the defense bar. This Essay suggests much of the criticism is misplaced, and, that if care is exercised in separating the roles that defense counsel plays in communities with problem-solving courts the promise of this approach for appropriate offenders can be realized without compromising the core duties that counsel owes her client. The template proposed here for reconciling these conflicting interests is based in large part on the work and experiences of shareholders in Wisconsin problem-solving courts. It is further suggested that the proposed ABA Criminal Justice Standards for the Defense Function fail to address most, if not all, of the unique defense function issues presented by the problem-solving court model.

* Clinical Associate Professor of Law and Director of the Prosecution Project, University of Wisconsin Law School.

TABLE OF CONTENTS

INTRODUCTION.....	1350
I. WISCONSIN PROBLEM-SOLVING COURTS: COMMON THEMES AND PRACTICES	1355
A. THE IMPETUS FOR THE CREATION OF PROBLEM-SOLVING COURTS.....	1355
B. PLANNING AND ADVISORY COMMITTEES	1356
C. TREATMENT COURT FUNDING.....	1356
D. PROBLEM-SOLVING COURT STRUCTURE	1356
E. THE TREATMENT TEAM.....	1357
F. ELIGIBILITY FOR PARTICIPATION.....	1358
G. LEGAL CONTROL OVER THE PROBLEM-SOLVING COURT PARTICIPANT	1358
H. COMMON PROCEDURAL PRACTICES.....	1360
1. <i>Timing of Admission</i>	1360
2. <i>Treatment Team Staffings</i>	1360
3. <i>A Prototypical Treatment Court Hearing</i>	1360
4. <i>The Role of the Trial Judge</i>	1361
5. <i>The Roles of the Team Members at the Hearing</i>	1362
6. <i>The Role of the Participant's Defense Attorney</i>	1362
7. <i>Violation of Problem-Solving Court Rules</i>	1363
8. <i>Graduation: Successful Completion of the Program</i>	1363
9. <i>Evaluation and Assessment</i>	1364
I. WISCONSIN DEFENSE ATTORNEYS: PERSPECTIVES ON PROBLEM-SOLVING COURTS	1364
II. DIFFERENT ROLES: DEFENSE COUNSEL AS A MEMBER OF THE PROBLEM-SOLVING COURT PLANNING AND ADVISORY GROUP.....	1365
III. DIFFERENT ROLES: DEFENSE COUNSEL AS A MEMBER OF THE PROBLEM-SOLVING COURT TREATMENT TEAM.....	1367
IV. DIFFERENT ROLES: THE LAWYER REPRESENTING INDIVIDUAL CLIENTS IN COMMUNITIES WITH PROBLEM-SOLVING COURTS.....	1371
CONCLUSION: WISCONSIN EFFORTS TO REDEFINE ROLES AND BEYOND...	1374

INTRODUCTION

The emergence of problem-solving courts¹ as an option for offenders with serious substance abuse problems is among the most

1. Throughout this Essay, the terms "problem-solving courts" and "treatment courts" will be

discussed recent innovations in the criminal justice system. Although these courts affect only a small percentage of cases,² their novelty and abandonment of the traditional adversary model have generated both substantial praise and substantial criticism. The most outspoken criticism has come from the defense bar, which is perhaps surprising given that problem-solving courts can offer a chance for treatment instead of punishment and, if successful, can benefit a client in ways not possible with traditional case processing. There appear to be two reasons for these criticisms.

First is strong disagreement with problem-solving court proponents who urge abandonment of the traditional defense role in favor of a collaborative approach supportive of treatment objectives.³ To the extent that some proponents of treatment fail to acknowledge that the choice to seek treatment rather than to litigate belongs to the client and not to the lawyer, the court, or the treatment team, this criticism is well-founded. However, the better approach is to refine the structure of problem-solving courts to accommodate the role of defense counsel rather than to reject the alternative altogether.

A second source of defense criticism is grounded in two deep-seated and persistent beliefs among many defense attorneys.⁴ First, is the belief that only traditional adversary processes adequately protect a defendant's interests; second, is the belief that effective representation can be achieved only by the aggressive assertion of procedural protections. This criticism is manifest in academic discussions,⁵ and finds

used interchangeably.

2. Candace McCoy, Commentary, *The Politics of Problem-Solving: An Overview of the Origins and Development of Therapeutic Courts*, 40 AM. CRIM. L. REV. 1513, 1528 (2003).

3. See Peggy Fulton Hora et al., *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439, 479–80 (1999); Judith S. Kaye, Chief Judge, Court of Appeals of N.Y., *Lawyering for a New Age*, Remarks at Fordham Law School's Sonnett Lecture Series (Apr. 8, 1998), in 67 FORDHAM L. REV. 1, 5 (1998).

4. A third concern is perceived structural and operational flaws in some problem-solving courts. Examples cited in the literature include the belief that prosecutors "dump" weak cases into treatment, the concern that the courts improperly require a treatment decision before the case can be thoroughly investigated, and the sense that the process imposes harsher treatment on failed participants than those eschewing treatment courts altogether. Mae C. Quinn, *Whose Team Am I on Anyway? Musings of a Public Defender About Drug Treatment Court Practice*, 26 N.Y.U. REV. L. & SOC. CHANGE 37, 54–56, 58–59, 61–62 (2001). There is no question that many courts that claim to be problem-solving courts have serious design and implementation flaws. However, these are correctable and are not a reason to abandon the promise of treatment for appropriate offenders. A defense presence in the planning and oversight of the court can prevent such procedures from inclusion in the local court design at all.

5. See generally, e.g., Tamar M. Meekins, "Specialized Justice": *The Over-Emergence of Specialty Courts and the Threat of a New Criminal Defense Paradigm*, 40 SUFFOLK U. L. REV. 1 (2006) (discussing the dangers of the changed defender role from an adversarial, zealous advocate to that of a team player in specialty courts); Mae C. Quinn, *An RSVP to Professor Wexler's Warm Therapeutic Jurisprudence Invitation to the Criminal Defense Bar: Unable to Join You, Already (Somewhat Similarly) Engaged*, 48 B.C. L. REV. 539 (2007) (challenging Professor David Wexler's suggestion of

support in several of the proposed revisions to the ABA Criminal Justice Standards for the Defense Function⁶ and in the reports of national defense organizations.⁷ Given that problem-solving courts present a different model, they are seen as a threat to the fairness of our justice system, to the interests of individual defendants, and to the very essence of the defense function. However, the intimation that there is only one appropriate systemic design and approach to advocacy is unfortunate. This viewpoint undervalues client autonomy and fails to acknowledge that well-informed and competent clients may very well choose treatment over litigation. Defense counsel's preference for litigation cannot trump an informed client's wishes. An exclusive focus on litigation fails to acknowledge that the vast majority of cases are settled rather than tried with procedures not altogether different from those in problem-solving courts.⁸ A preoccupation with adversary processes risks undervaluing the distinct skills necessary for effective advocacy in nonadversary settings.

Additionally, a defense predisposition against innovation will not prevent system experimentation. It only prevents the defense bar from meaningful involvement in the planning and implementation of such efforts, a role that can preserve the positive elements of a problem-solving approach without abandoning traditional procedural protections.

My view of the role of counsel in problem-solving courts is based in large part on my research of Wisconsin practices since 2006.⁹ In the

adopting therapeutic jurisprudence principles and supporting a traditional advocacy role); Quinn, *supra* note 4 (analyzing drug treatment court practices from the perspective of a criminal defense attorney practicing in the Bronx Treatment Court); Jane M. Spinak, Commentary, *Why Defenders Feel Defensive: The Defender's Role in Problem-Solving Courts*, 40 AM. CRIM. L. REV. 1617 (2003) (describing the reasons why defenders do not share the same experiences as other stakeholders in creating and executing problem-solving courts).

6. Several of the proposed Defense Function Standards focus on the role of counsel in contested cases. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-7.1 to 4-9.6 (Proposed Revisions 2009). The focus of the remaining sections, although broadly framed, is on defense counsel in their traditional role. *See generally id.*

7. In September of 2009, the National Association of Criminal Defense Lawyers ("NACDL") issued a report that, on the whole, is critical of problem-solving courts and reflects a clear preference for counsel to act as partisan advocates in an adversary framework. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, AMERICA'S PROBLEM-SOLVING COURTS: THE CRIMINAL COSTS OF TREATMENT AND THE CASE FOR REFORM (2009). In my view, the report was written to support the NACDL's predisposition against problem-solving courts rather than to provide a report that could make valuable contributions to the dialogue about the role of defense counsel in such courts.

8. For example, 96.3% of federal criminal cases in 2009 were resolved by plea rather than trial. U.S. SENTENCING COMM'N, SOURCEBOOK OF FEDERAL SENTENCING STATISTICS tbl. 11 (2009), available at http://www.ussc.gov/Data_and_Statistics/Annual_Reports_and_Sourcebooks/2009/SBTOCo9.htm.

9. I have taught criminal law at the University of Wisconsin Law School since 1976, both in the classroom and in the clinical offerings at the Remington Center, a clinical program at our school. At the time of my investigation, thirteen treatment courts were in operation in Wisconsin. Now, there are at least twenty that are either fully operational or in the planning stages. During the summer of 2006, I observed five of these courts in great detail in Barron, Dane, Eau Claire, La Crosse, and Waukesha

summer and fall of 2006, I inventoried local innovations in selected Wisconsin communities in a joint project of the University of Wisconsin Law School and the Wisconsin Supreme Court's Planning and Policy Advisory Committee Alternatives to Incarceration Subcommittee.¹⁰ Perhaps the most impressive finding was a growing transition from a purely adversarial model to greater collaboration among local stakeholders and a willingness to experiment with new alternatives to achieve public safety. The emergence of problem-solving, or treatment, courts was a central feature of these new efforts.

My observations of Wisconsin problem-solving courts showed a very different picture than that described by critics of this model. I did not observe pressure on defense attorneys to abandon their traditional duties, nor did I observe systems where adversary safeguards were jettisoned in favor of treatment. Instead, I observed communities where judges, attorneys, and health care providers worked together in good faith to see if new responses to drug and alcohol abuse might accomplish that which traditional approaches could not. In these communities, the roles and practices of defense attorneys were multifaceted and nuanced in ways not mentioned in academic discussions. Counsel's actions fit into one or more of three distinct roles: (1) as a member of the problem-solving court planning or advisory group, (2) as a member of the problem-solving court treatment team, and (3) as a lawyer for an individual client.

Wisconsin attorneys did not self-define their roles as I describe them here. Through a process of collaborative trial and error, their actions seemed to evolve naturally into one or more of the three categories. The attorneys acted in these roles because they worked: These roles allowed defense counsel to have a voice in the creation and operation of problem-solving courts, while at the same time allowing for effective representation of individual clients. These distinctions have broader value—they offer a way of conceptualizing counsel's work in problem-solving courts, which preserves the option of treatment for appropriate offenders, respects the value of a vibrant defense role in all aspects of the court's creation and operation, and accommodates the core responsibilities a lawyer owes her client.

Counties. I interviewed team members and other interested criminal justice actors, observed team meetings and court sessions, and reviewed procedure and policy manuals, statistical reports, and memoranda of understanding among local system actors. Since that time, I have continued to track these efforts throughout Wisconsin. See BEN KEMPINEN, CRIMINAL JUSTICE INNOVATIONS IN WISCONSIN: A PRELIMINARY REPORT 55–56 (2006) [hereinafter KEMPINEN, PRELIMINARY REPORT]; Ben Kempinen, *From the Benches and Trenches: Criminal Justice Innovations in Wisconsin: Collaborative Decision Making*, 30 JUST. SYS. J. 327 (2009).

10. This committee was recently renamed the Effective Justice Strategies Subcommittee.

The first of these roles—defense counsel as a member of a problem-solving court planning or advisory committee—does not implicate the representation of clients at all and should not be viewed through the lens of the traditional lawyer-client paradigm. Rather, it involves the role of the lawyer as “an officer of the legal system and a public citizen having special responsibility for the quality of justice.”¹¹ This role is distinct from the lawyer representing a client and does not interfere with any duty owed to individual clients. Importantly, this role gives voice to defense perspectives in all aspects of a problem-solving court’s creation and operation.

The second role—defense counsel as a member of a problem-solving court treatment team—is novel and unique, and apparently varies greatly from court to court and jurisdiction to jurisdiction. Defense counsel did not represent participants in treatment, but were part of a group that collaborated to design and to monitor a treatment plan for each program participant. Defense attorney team members in courts that I observed were wholeheartedly committed to the treatment team concept—its focus on participant accountability, information sharing, and collaborative decisionmaking. Fidelity to the team raised several complex but soluble issues if current or former clients were program participants.

The third role—the attorney representing a client—implicates the traditional duties of counsel. In the context of problem-solving courts, the most important responsibility of counsel is to make sure the client makes an informed choice on whether or not to seek treatment. In such cases, the client is typically in the throes of drug or alcohol addiction, complicating her ability to process information and to make sound choices. The consultation involves additional challenges: the need to be knowledgeable about addictive behaviors, the client’s unique medical situation and receptivity to treatment, the nature and structure of the local program, and whether available treatment resources fit the client’s needs. Much has been made about the problem-solving model’s rejection of traditional adversary safeguards. However, as long as the choice is made by the client, and is voluntary and informed, counsel’s distaste for this option is irrelevant. And, of course, if the client rejects treatment, the representation continues on a traditional path.

This Essay has five parts. Part I reviews Wisconsin problem-solving court practices. There is great variation in the structure and operation of problem-solving courts. A basic understanding of common Wisconsin practices provides a context through which the suggestions offered can be critically examined. Parts II to IV are detailed discussions of the distinct roles counsel have played in Wisconsin problem-solving courts and the ethical implications of viewing the defense function in this way.

11. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 1 (2010).

Throughout these Parts, this Essay notes whether and how the revisions to the ABA Criminal Justice Standards for the Defense Function and existing ethics rules address these issues. Finally, the Essay offers some thoughts on how the Wisconsin experience might contribute to discussions of how best to encourage innovation without sacrificing the fundamental responsibilities defense counsel owes her client.

The reader may find it odd that a paper presented as part of a national dialogue about the proposed Defense Function Standards makes scant mention of them. This is not an oversight. It is because the Standards add little to the discussion of the defense role in problem-solving courts. Whether greater attention is given in the core Criminal Justice Standards or a more specific subset of related Standards, these issues merit attention as problem-solving courts continue to proliferate throughout the country.¹²

I. WISCONSIN PROBLEM-SOLVING COURTS: COMMON THEMES AND PRACTICES

A. THE IMPETUS FOR THE CREATION OF PROBLEM-SOLVING COURTS

Concerns over costs—typically the expected need for a new jail—and dissatisfaction with traditional approaches to alcohol and substance abuse provided the impetus to create problem-solving courts in Wisconsin communities.¹³ The decision to create such courts was, without exception, local in nature, with little input or assistance from the state.¹⁴ More often than not, discussions began at the urging of a local judge or county government official.

12. The ABA's practice of having distinct Standards for overlapping practice areas allows for detailed treatment of specific subjects but also creates challenges for the casual observer attempting to understand the ABA's position on a particular issue. For example, in the criminal justice area alone the ABA's website lists twenty-three different Standards. *Standards: About Criminal Justice Standards*, A.B.A., http://www.americanbar.org/groups/criminal_justice/policy/standards.html (last visited May 23, 2011). As of this writing, it appears that the Criminal Justice Standards Committee is preparing distinct Standards on diversion and specialized courts that will likely address issues unique to problem-solving courts. My colleague, Professor Walter J. Dickey, is the reporter for the ABA Diversion and Special Courts Task Force Subcommittee. He reports that Standards dealing with many of the issues discussed in this Essay are forthcoming. As of this writing, drafts of these Standards are not available.

13. During my visits to Wisconsin treatment courts in the summer and fall of 2006, virtually all of the judges, prosecutors, defenders, and local government officials identified these reasons as animating their creation of a treatment option for offenders with alcohol or substance abuse problems.

14. During the mid- to late-1990s, Congress provided substantial financial and technical support to communities wishing to create problem-solving courts. See McCoy, *supra* note 2, at 1519–27. All of the Wisconsin communities that created problem-solving courts sought to take advantage of these resources. At the state level, the Wisconsin legislature created the Treatment Alternatives and Diversion (“TAD”) grant program by Act 25, 2005–2006 Leg. Sess. (Wis. 2005) (codified at Wis. STAT. § 16.964(12) (2009)), which provided additional funding support. *Treatment Alternatives and Diversion (TAD) Program*, Wis. COURT Sys., <http://www.wicourts.gov/about/organization/programs/attdtreatment.htm> (last modified Feb. 17, 2011)

B. PLANNING AND ADVISORY COMMITTEES

The first step in considering creation of a problem-solving court was the formation of an advisory and planning committee. The group typically consisted of a local judge, a county board member, a prosecutor, a representative from law enforcement, and the local public defender.¹⁵ The group visited communities with existing problem-solving courts and attended nationally-sponsored training sessions. It decided threshold questions such as the target population, admission criteria, the legal status of treatment participants, and program procedures. Although the dynamics and allocation of authority within these groups varied from county to county, the broad spectrum of membership, including the public defender, served to ensure that the ultimate court design reflected a composite of interests and points of view. After the court began operations, the committee continued in an advisory and oversight role.

C. TREATMENT COURT FUNDING

Most counties received external funding for training and start-up costs. After a court was established, costs were usually absorbed by each county, sometimes with partial support from public or private grants. In several northwestern Wisconsin counties, the state corrections agency provided funding and supervisory resources. This was a direct response to a perceived epidemic of methamphetamine abuse in those areas, for which traditional responses had proven ineffectual.

Treatment services were the largest operational expense. In some instances, existing county resources were reallocated to provide the needed services. In others, the county contracted with private service providers. All counties believed costs would be offset by savings in reduced jail populations and that even greater future savings would be realized as program graduates successfully reintegrated into their communities. Participants were usually required to pay a fee to partially defray program costs and to encourage financial responsibility. Community service was available to those unable to pay.

D. PROBLEM-SOLVING COURT STRUCTURE

In structure, philosophy, and operation, problem-solving courts differ substantially from traditional criminal courts. The National Association of Drug Court Professionals ("NADCP") has identified ten "key components" of this type of court. They include:

- (1) Integrating treatment services with traditional case-processing;

15. There was no visible private defense presence in Wisconsin in the planning and oversight process. This was likely a function of the financial difficulty in making a time-consuming commitment and the relatively small size of the private defense bar rather than a lack of interest.

- (2) Adopting a nonadversarial, team approach to offenders' problems;¹⁶
- (3) Promptly identifying and placing offenders in the problem-solving court program;
- (4) Providing a continuum of services depending on the particular offender's needs;
- (5) Regularly monitoring a participant's compliance with program requirements;
- (6) Combining a system of prompt rewards and sanctions for program participants;
- (7) Interacting with each program participant on a regular judicial basis;
- (8) Adequately keeping records to continually monitor the achievement of program objectives;
- (9) Continuing interdisciplinary education and evaluation of best practice strategies; and
- (10) Creating partnerships between problem-solving courts, justice agencies and the community at large to support the initiatives.¹⁷

Shareholders in all of the Wisconsin counties visited relied on the NADCP Key Components in designing and implementing their treatment courts.

E. THE TREATMENT TEAM

At the core of all problem-solving courts was the treatment team. Wisconsin treatment teams included the trial judge and treatment professionals. In most, a probation agent, prosecutor, and public defender were also members, as were, in a few, local law enforcement representatives.¹⁸ The team made both general policy and individual case decisions. The public defender team member did not represent clients in treatment simultaneously with their participation as team members. Traditional roles were replaced by a collaborative model where all worked together, openly shared information, and created individual treatment plans for each program participant.

16. Key Component No. 2, with its call to embrace a collaborative team approach to the defense function, has predictably been criticized. *See, e.g.*, NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 7, at 30–34. Regrettably, its performance benchmarks fail to acknowledge client autonomy, the potential conflicting ethical duties of counsel, or the varied and nuanced roles defense counsel may play in communities with problem-solving courts.

17. U.S. DEP'T OF JUSTICE & NAT'L ASS'N OF DRUG COURT PROF'LS, *DEFINING DRUG COURTS: THE KEY COMPONENTS* (reprt. 2004) (listing and discussing each "key component").

18. In one county, the public defender temporarily withdrew from the team but has since rejoined. In another, the prosecutor refused to assign an assistant to the treatment court, claiming a lacking sufficient staff. Since that time, a new prosecutor was elected and has assigned an assistant to the treatment team.

F. ELIGIBILITY FOR PARTICIPATION

Eligibility criteria were developed at the local level and differed from court to court.¹⁹ There were generally four steps in the screening process: (1) a referral by the district attorney,²⁰ (2) an assessment and recommendation by a treatment professional, (3) a request by the offender to participate, and (4) the treatment team's decision to grant or deny admission. A common theme with all admitted participants was the desire to confront a serious drug or alcohol problem.²¹

G. LEGAL CONTROL OVER THE PROBLEM-SOLVING COURT PARTICIPANT

All participants in Wisconsin's problem-solving courts had pending criminal charges or had been convicted by a plea of guilty. Wisconsin problem-solving courts were not diversion programs. Formal charges provided judicial authority to impose and enforce treatment conditions. There were two variations: pre- and post-judgment courts, with the latter being the most common. In pre-judgment courts, each defendant was charged with a crime, with traditional processes suspended while she was involved in treatment. Typically, but not always, some future benefit

19. According to interviews with local actors involved in the creation of treatment courts, a condition of federal funding was the exclusion of certain violent offenders. As a consequence, counties receiving federal support adjusted their admission criteria accordingly. Those not reliant on federal monies were free to define admission criteria without external limitations.

20. In all Wisconsin communities, cases were screened for prospective merit before any consideration of referral to a problem-solving court was made. If a case was determined to be lacking in proof or found otherwise wanting, no charges were filed. There was no evidence of "dumping cases"—referring weak cases to treatment—as reported in other jurisdictions. Quinn, *supra* note 4, at 58–59. However, in some communities, referral decisions were controlled by the prosecutors specializing in drug cases, some of whom did not believe in the treatment court model. This created a risk of excluding appropriate candidates and frustrating basic program objectives. A solution to this problem could be to rely on written admission criteria developed by the oversight committee rather than the ad hoc decisions of individual prosecutors.

21. If an accused asked counsel to explore admission to treatment, it was critical for counsel to understand the admission criteria and the process by which admission decisions were made. This was more complicated and varied than one might imagine.

First, counsel needed to know if the client's situation fit into the targeted treatment population in the particular county. Defining who and what to treat were among the first issues decided in each treatment court. In northwestern Wisconsin, it was methamphetamine abusers; in Madison, there was a mix of crack cocaine, heroin, and prescription drug users; and in Waukesha, the team treatment targeted chronic alcoholics with repeat drunk driving offenses. Some observers opined that some communities began with "easy" cases—casual use of recreational drugs—to ensure the success of the program and to avoid a spectacular failure. In other communities, some recommended a focus on offenders likely to receive jail rather than prison time. The expected savings in jail beds would provide support for the treatment program. Awareness of the contours of the local discussion was an important part of effectively advocating for admission.

Once the general target population was determined, individual admission decisions typically had substantial flexibility. This provided opportunities for the experienced defense counsel to fashion arguments that would resonate with the actual decisionmaker and contribute to effective client preparation in anticipation of an intake interview.

such as dismissal or amendment of charges was offered, conditioned on completion of the program. A subclass of pre-judgment drug courts saw offenders actually enter pleas of guilty without entry of judgment.²² Authority over the participant derived from the bail authority granted trial judges under chapter 969 of the Wisconsin Statutes.²³ If the offender graduated from the program, she would receive the promised concession, usually a dismissal or reduction of the original charge. If the offender was dismissed for noncompliance, the case returned to the traditional case-processing track.²⁴

In post-judgment courts, participants were convicted of a crime and sentenced to probation. Treatment requirements were court-ordered conditions. This allowed for the transfer of supervision costs from the county to the state corrections agency.²⁵

In all cases, participants signed written contracts. They contained both generic information about their rights and obligations, and conditions unique to individual cases. Contracts ran from nine months to two years with varying levels of treatment and aftercare.

22. The defense bar has criticized requiring a defendant to plead guilty as a precondition to entry into a problem-solving court. Among the reasons advanced are a concern that coerced treatment is unlikely to be successful, that defendants should not have to forfeit procedural rights to obtain treatment, and a concern that treatment failures would be punished more severely than if the defendant had been convicted without participation in treatment. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 7, at 25–26.

23. Conditional pleas of guilty were preferred—at least by prosecutors and trial courts—because they preserved a conviction in the event of a program failure. The defendant would appear in court, enter a plea of guilty or no contest, and engage in a typical colloquy with the court. *See* WIS. STAT. § 971.08 (2009). The court would find the plea was voluntary and intelligently made, but judgment would not be entered on the plea, avoiding a conviction. If, weeks or months later, the defendant was expelled from treatment, judgment could be entered based on the prior findings and all that remained would be sentencing. On the other hand, if the defendant successfully completed the program, charges could be dismissed without the need to vacate a conviction. In this way, a conditional plea could serve the interests of the defendant and the prosecutor and comply with Wisconsin statutory requirements. *Cf.* *State v. Daley*, 709 N.W.2d 888, 891 (Wis. Ct. App. 2005) (permitting a plea as part of a deferred prosecution agreement). *But cf.* *State v. Dawson*, 688 N.W.2d 12, 16 (Wis. Ct. App. 2004) (reversing denial of plea withdrawal because the reopen-and-amend provision of the plea agreement was legally unenforceable). Not surprisingly, the National District Attorney's Association favors conditional pleas, whereas defender organizations typically do not. *See, e.g.,* NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 7, at 11; NAT'L DIST. ATTORNEYS ASS'N, NATIONAL PROSECUTION STANDARDS § 4-3.6 (3d ed. 2009).

24. It has been suggested that in some treatment courts, failures are followed by more severe punishments than if the offender had been convicted without being in treatment. NAT'L ASS'N OF CRIMINAL DEF. LAWYERS, *supra* note 7, at 29. No evidence of this was seen in Wisconsin.

25. An exception to the practice of transferring supervision costs to the state was the Waukesha County treatment court, which focused exclusively on repeat drunk driving cases. Under then-existing Wisconsin law, probation was not allowed for offenders with multiple prior drunk driving convictions. As a consequence, the cost of supervising treatment court participants was borne by the county rather than the state. KEMPINEN, PRELIMINARY REPORT, *supra* note 9.

H. COMMON PROCEDURAL PRACTICES

1. *Timing of Admission*

The decision to consider treatment usually occurred shortly after criminal charges were filed.²⁶ There was no difference in the early stages of a case between treatment and nontreatment court cases. Police or citizen referrals were screened by prosecutors according to normal procedures; counsel was appointed; and discovery was exchanged according to local practice. There was no evidence that unprovable cases were referred for treatment or that defendants were forced to decide whether to seek treatment before their attorney could thoroughly review their case. This was as much a result of resource levels as program design—in most communities, there was a backlog of applicants waiting for admission to treatment.²⁷

2. *Treatment Team Staffings*

Several features distinguished Wisconsin's problem-solving courts from traditional courts. Two of the most significant were team meetings before each court session to discuss each case on the calendar as well as continuing appearances in court during the course of treatment. Team meetings were scheduled early in the morning prior to the court session. Team members then reviewed the case of each participant scheduled to appear that day. Team discussions were frank and open; traditional formulations of the roles of trial judge, prosecutor, and defense attorney were noticeably absent. Given the close monitoring of each participant, the team knew significantly more about the participant than would be known in a traditional case processing system. The unstated, yet clearly shared, goal was to make the offender succeed, not to "close" the case, punish the participant, or remove the participant from the program. Neither the participants nor their lawyers were present at team meetings.

3. *A Prototypical Treatment Court Hearing*

From the first instant, it became clear that problem-solving court hearings were different from traditional criminal court proceedings. Rare was the mention of case file numbers or offense names; the dialogue focused on the participants' lives, their families, their problems, their successes, and their failures. Depending on participants' progress or perceived treatment needs, they were required to appear on a weekly,

26. In some communities, treatment court was used as an alternative to revocation of probation, parole, or extended release. In this situation, entry into treatment might be months or years after conviction and sentencing.

27. There are troubling reports that, in some jurisdictions, defendants are forced to decide quickly whether to pursue treatment or to forfeit the opportunity before their attorney has received discovery or completed investigation of the case. See, e.g., Meekins, *supra* note 5, at 4–7. Without question, problem-solving courts must be designed to accommodate the need for defense counsel to obtain discovery, investigate, and consult with the client.

biweekly, or monthly basis. If they had done well since the last hearing, they were praised and often rewarded with a gift certificate from a local restaurant or movie theater. If they had relapsed or failed to meet a condition, they faced an immediate sanction: ranging from denial of permission to travel out of the county, to a night in jail, to outright dismissal from the program. Many participants admitted relapses—using drugs or alcohol—usually early in the process. Although many violations constituted criminal conduct, none were charged, given the policy of immunizing participants from admissions made in the course of treatment.²⁸

Each participant scheduled to appear on a particular day was expected to remain for the entire session of drug court, even after their appearance was completed. As a group, they applauded a coparticipant's successes or voiced collective disappointment upon hearing of another's failings.

4. *The Role of the Trial Judge*

The trial judge's role in problem-solving courts was very different from the traditional role of passive neutrality.²⁹ The court was actively involved in treatment decisions and predisposed to do all in its power to help the participant succeed. Information flowed freely between judge, treatment professionals, prosecutor, and defense attorney; the normal filters of confidentiality and evidentiary privileges did not apply. Whatever was known or suspected by any team member was known by all, including the trial judge. The trial judge participated in the weekly staff meetings, was familiar with the details of each defendant's situation, and personally engaged each participant at their court appearances.

In some cases, the judge even acted as an advocate for the participant in need of legal advice—suggesting how to deal with an overdue utilities bill or how to seek visitation with one's children—in addition to monitoring the person's treatment progress.

The trial judge was the central authority figure in treatment court, bearing ultimate responsibility to mete out an award or sanction, or to permit a defendant to remain in the program. Although most decisions

28. There was general agreement that a participant's admission of drug use could not be the basis of a new possession charge. Less clear was the propriety of use of admissions to investigate others who may have provided the drugs, or what should occur if the participant admitted to a very serious crime, for example, a homicide or serious sexual assault. Several defense attorneys appropriately complained about the lack of clarity about the scope of immunity, explaining that it prevented them from fully and accurately explaining the risks of entry into a treatment program. The scope of immunity remains an issue in need of additional clarification in problem-solving court practice.

29. See Greg Berman, *What Is a Traditional Judge Anyway?: Problem Solving in the State Courts*, 84 JUDICATURE 78, 80 (2000); Richard Boldt & Jana Singer, *Juristocracy in the Trenches: Problem-Solving Judges and Therapeutic Jurisprudence in Drug Treatment Courts and Unified Family Courts*, 65 MD. L. REV. 82, 87 (2006); James L. Nolan, Jr., *Therapeutic Adjudication*, SOCIETY, Jan./Feb. 2002, at 29, 32.

reflected the collective view of the entire team, the trial judge was in control, both in the eyes of the offender and in those of the treatment team.³⁰

5. *The Roles of the Team Members at the Hearing*

After the trial judge, treatment professionals and probation agents were the second-most important players during the court hearings. This was not surprising. Treatment, rather than retribution, was the focus of the program, and the treatment professionals and agents had more training and continuing contact with participants than did the other team members. The trial judge, prosecutor, and defense attorney team members often looked to treatment professionals and agents for guidance in managing the participants' program experience. During court hearings, the treatment professional or agent typically sat at counsel table where defense counsel would be seated in a traditional court setting.

The prosecutor and public defender team members played lesser roles at the hearings.³¹ The prosecutor provided case information and answered legal questions that arose. The role of the public defender team member was less clear. Like the prosecutor, the public defender was sometimes called upon to answer legal questions. However, the public defender did not represent program participants and rarely had contact with a participant during a hearing.³² This was in contrast to the team meetings, where the public defender was an equal partner in discussions and decisionmaking.

6. *The Role of the Participant's Defense Attorney*

Once the client was admitted into the treatment program, Wisconsin defense attorneys—public and private—assumed that their role in the case was over. Not once did I see defense counsel for a participant appear at a problem-solving court hearing. A number of explanations were provided.

The most common, at least in post-judgment cases, was that the case was over and counsel's responsibilities were finished. Admission to

30. One criticism of problem-solving courts is their drain on scarce judicial resources. Several of the judges interviewed raised concerns that treatment courts would strain already limited judicial resources given that program participants would appear in court several times over the course of treatment, compared with one or two appearances under a traditional processing model. However, it seemed clear that the stature of the judge and respect for judicial authority was critical to the operation of the courts observed. It is difficult to imagine what other system actor could fill that role.

31. In one court, there was no defense presence, and in another, no prosecutor.

32. On occasion, the trial judge referred a question from a participant to the public defender team member. I was not privy to these conversations, which were conducted away from the others present in court. If the public defender team member did not represent the participant, information shared would not be confidential. MODEL RULES OF PROF'L CONDUCT R. 1.6(a) (2010). This suggests that the public defender team member should explain this to the participant and clarify his role to avoid confusion. *Id.* R. 4.3.

treatment was viewed like the imposition of a sentence. And, in post-judgment courts where probation was ordered with treatment as a condition, it was in fact a sentence. Just as defense counsel do not ordinarily track clients when they serve a jail sentence or are placed on probation, none believed they had a responsibility to attend program court sessions.³³ Wisconsin public defenders closed their files at the point of admission to treatment.

Although private attorneys did not view the end of representation in such precise terms, many felt it was not financially feasible or practically necessary to attend weekly treatment court hearings simply to observe what would likely be a brief appearance, which could occur at any time during a two-to-four hour court session and where the trial court wanted to hear from the client, not the lawyer.

7. Violation of Problem-Solving Court Rules

When participants could or would not comply with treatment requirements, they faced a variety of sanctions, including expulsion from the program. Although myriad violations occurred in the nearly eighty cases observed in various treatment courts, expulsion was discussed only twice. Relapses were expected, especially early in the course of treatment. Although many relapses involved criminal drug use, they were seen as a failure of the treatment plan rather than a reason to issue new criminal charges. The most typical response to a violation was to modify the treatment plan. Treatment success, rather than punishment, was the team's goal.

Treatment team members had a variety of ways of dealing with serious program violations. In one county, the judge recused himself from team discussions of expulsion, explaining that he expected to preside over the expulsion hearing should one be scheduled. Other judges participated in the decision to expel a participant because the expulsion hearing would be transferred to another judge. Counsel was appointed in all counties for participants faced with expulsion. The hearings were similar to probation or parole revocation hearings, with basic procedural safeguards but without the formality of a trial.

8. Graduation: Successful Completion of the Program

When a participant successfully completed treatment, a graduation ceremony of sorts was held. I observed a handful of these hearings, and they were among the most remarkable hearings that I have seen in more than thirty years of practice and teaching. Typically, the participant was praised for her hard work, awarded a certificate of completion, and applauded by all other participants present for the day's hearings. I did

33. This explanation is less satisfactory in pre-judgment courts where treatment is a condition of bail and criminal charges remain pending. Nonetheless, there were no defense attorneys in either pre- or post-judgment Wisconsin problem-solving courts.

not see defense counsel at any of these hearings. Promised concessions were granted following program completion with minimal additional process—at most, a perfunctory hearing—and often with the participant unrepresented.

9. *Evaluation and Assessment*

Each county kept track of program successes and failures. Three types of data were generated: the results of risk assessment tools used to make admission decisions, the treatment records of participants,³⁴ and treatment-jail cost comparisons to demonstrate jail-bed savings. Only a few of the courts were in existence long enough to generate the type of statistical information that might begin to allow for long-term outcome assessments.

I. WISCONSIN DEFENSE ATTORNEYS: PERSPECTIVES ON PROBLEM-SOLVING COURTS

I spoke to defense attorneys in each of the Wisconsin counties with problem-solving courts. They expressed a wide range of opinions and levels of knowledge about the underlying theory and day-to-day administration of this type of court.

A substantial number—both public defenders and private defense attorneys—were encouraged by the focus on treatment instead of punishment for clients with chronic alcohol or substance abuse problems. They sought to learn as much as possible about their local court program, to enable them to explain this option accurately to their clients. Several admitted a need to learn more about addictive behaviors and effective interventions. At least one said he would seek an independent assessment prior to recommending treatment. Even the most enthusiastic, experienced lawyers noted that this option was viable only for certain clients. Clients who struggled with probation or parole supervision might not survive the structure and discipline of a problem-solving court program. Attorneys for these kinds of clients believed candid and accurate client counseling was critical. As long as their clients' decisions were fully informed, they were not troubled in the least by the broad waiver of rights that accompanied participation in treatment.

A smaller but significant group of defense attorneys were predisposed against treatment courts as a matter of principle. They were outspoken and adamant about the danger of the wholesale waiver of procedural rights, the lost opportunity to challenge the charges by any and all means, and the abandonment of traditional safeguards for what they viewed as an unproven product. They did not know, nor seemed to

34. Each county had policies about access to and use of participant medical records.

care to know, a great deal about their local problem-solving courts, had not observed them in operation, and, for the most part, had no interest in doing so. It seemed clear that these attorneys would discourage their clients from pursuing this option regardless of the circumstances.

A few attorneys, often recent law school graduates or attorneys who were not criminal law specialists, were only generally aware of how treatment courts functioned, particularly in communities where the program was new. They did not have strong opinions for or against problem-solving courts. Rather, they expressed a simplistic view of the option, seeing it as another means to seek a charge or sentencing concession from the prosecutor. They seemed willing to recommend treatment without a clear understanding of what the program required or whether their client had a realistic chance of success.

II. DIFFERENT ROLES: DEFENSE COUNSEL AS A MEMBER OF THE PROBLEM-SOLVING COURT PLANNING AND ADVISORY GROUP

In Wisconsin, it was commonplace for a defense attorney—always a public defender—to be a member of the problem-solving court's planning and advisory group. A defense presence at the earliest stages and in a continuing oversight role had substantial value. Public defenders' sensitivity to procedural fairness and knowledge of their clients' life circumstances contributed to responding effectively to many of the issues involved in creating a problem-solving court. Such issues include:

- (1) What are the greatest substance abuse issues in our community, and what is their impact?
- (2) What substances or offenders should be the target of the problem-solving court's efforts?
- (3) What are the admission criteria, and should they be uniform or flexible?
- (4) How can procedures for case processing and admission to treatment be designed to ensure that defense counsel has sufficient time to receive discovery materials, investigate, consult, and advise the client about the treatment option?
- (5) What concessions should follow a participant's successful completion of treatment?
- (6) What waivers of procedural rights and confidentiality are necessary and appropriate, and how can they best be explained to prospective participants?
- (7) What safeguards are necessary to protect the privacy of the participant's treatment records during and after participation in the program?
- (8) To what extent should the participant's admissions of criminal conduct be immunized if required as a condition of program involvement?

- (9) What, if any, is the proper role of defense counsel at treatment team staffings or court hearings?
- (10) What due process protections should apply when the treatment team seeks to remove a participant for rule violations?
- (11) Should there be a written contract between the participant and treatment team, and, if so, what information should be included, and who should sign the contract?
- (12) How should cases be handled if the participant is terminated from the program?

These questions represent a nonexhaustive list of issues in the design and implementation of any problem-solving court. Much of the criticism of the problem-solving court model is, in reality, a criticism of individual courts whose design does not properly accommodate an offender's right to counsel or incorporate appropriate measures of procedural fairness in court procedures.³⁵ But these problems can be addressed more effectively by including a defense attorney's voice when the problem-solving court is created, rather than attempting to litigate systemic flaws on an individual, ad hoc basis or rejecting the treatment approach altogether. The Wisconsin experience—with an active defense presence in the design and implementation of its problem-solving courts—provides clear proof of the effectiveness of this approach, given that many of the problems identified with problem-solving courts in other jurisdictions simply do not exist in Wisconsin.

Historically, the defense bar has not always been an equal player at the policy-making stages of criminal justice systems. This is an opportunity lost. Decisions made with no defense input undervalue the interests of defendants and the importance of fair process. A review of literature confirms there has often been little or no defense involvement in the planning and oversight of problem-solving courts.³⁶ Several reasons have been suggested.

In some communities, it appears the defense bar may have been intentionally excluded. If true, this is unfortunate, is inconsistent with notions of collaboration that inhere in treatment modalities, and deprives the community of valuable information unavailable elsewhere. In other instances, the defense bar has apparently chosen not to participate, for fear of not being an equal partner, because of concerns that a problem-solving approach would not serve their clients' interests, or out of a general distrust of problem-solving courts.³⁷ Some attorneys have also

35. See *supra* notes 4, 20, 24, & 27.

36. See Spinak, *supra* note 5, at 1618–23.

37. It is often true that defense attorneys do not speak with a single voice and that even within a single defender agency, there can be significant differences of opinion on matters of policy. *Id.* at 1619.

suggested that a defense presence in policymaking could result in systemic changes that might harm individual clients.³⁸

Ethics codes and practice standards give only fleeting attention to defense counsel functioning as a policy maker. The ABA Model Rules of Professional Conduct mention the attorney's role as an "officer of the legal system" and a "public citizen having special responsibility for the quality of justice" only in the preamble.³⁹ The proposed Defense Function Standards announce a duty to the "administration of justice" but suggest the primary means to do so is by providing quality representation to individual clients.⁴⁰ This is unfortunate and ironic given that much of the ABA's work reflects lawyers, both private and public, giving their time to help improve the profession and legal system. The potential benefits of an active defense presence at this level of system functioning are clear.⁴¹ And, if defense counsel sees himself as an "officer of the legal system" and a "citizen" with special knowledge, this role presents no conflicts or other ethical problems in relation to existing clients.

III. DIFFERENT ROLES: DEFENSE COUNSEL AS A MEMBER OF THE PROBLEM-SOLVING COURT TREATMENT TEAM

In one sense, the role of defense counsel as a treatment team member can be easily described: to be part of a group whose collective goal is designing and managing a treatment program for a problem-solving court participant. This role becomes more complicated when defense counsel is expected to act as a team member while simultaneously representing an individual program participant.⁴²

38. It has been suggested to the Author by defense attorneys on more than one occasion that the defense bar should not participate in reform of system flaws that some individual clients have been able to exploit for their benefit. Justifications for this perspective range from the view that defense counsel must never act to eliminate a potential benefit for a current or future client to the opinion that defense counsel's responsibility to the system is limited to effective representation of individual clients.

39. MODEL RULES OF PROF'L CONDUCT pmbl. ¶ 1 (2010). The only other mention of an attorney acting in an advisory or oversight capacity is found in Rule 6.3, discussing the application of conflict of interest rules to the lawyer acting in a law reform capacity. *Id.* R. 6.3.

40. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.2(b) (Proposed Revisions 2009) Standard 4-1.2(d) does provide that "[d]efense counsel should seek to reform and improve the administration of criminal justice" when "inadequacies" or "injustices" exist. In the eyes of many defense attorneys, this call to duty is limited to system practices that inure to the detriment of offenders and not to overall system reform. *Id.*

41. The policy and procedure manuals adopted by Wisconsin treatment courts bear the imprint of defense input on many of these issues, reflecting a balance between treatment goals and procedural fairness. *See, e.g.,* ST. CROIX CNTY. DRUG COURT PROGRAM, POLICIES AND PROCEDURES MANUAL (2007) (on file with the Author).

42. Complications for the defense attorney team member also arose if a former client or former firm client were involved in treatment. Possible solutions to these problems are offered *infra* notes 51-57 and accompanying text.

An examination of the interests that inhere in the two roles demonstrates the difficulty. The defining feature of being a treatment team member is fidelity to the team—a commitment to an open and collaborative decisionmaking process, full sharing of information, and a collective goal of having the participant succeed in treatment. In Wisconsin, defense counsel team members thrived in this role; they embraced it enthusiastically and added a valuable perspective not provided by other team members.

In contrast, the lawyer for an individual client owes allegiance to the client, and must, as part of that responsibility, protect confidential information,⁴³ pursue the lawful objectives selected by the client regardless of the wishes of nonclients,⁴⁴ and avoid interests that would interfere with providing that which the client demands.⁴⁵ Imagine a participant who tired of treatment, wished to quit, began using drugs again, and confided all of this to her lawyer. Imagine further that her lawyer was a treatment team member. If counsel honored her commitment to the client, she would betray her responsibilities as a team member. If she shared the client's confidences with the team, she would violate her duty to her client. There is no way the lawyer's "personal interest" in team membership could be maintained while serving her client's interests.

This situation presents a classic example of a concurrent conflict of interest.⁴⁶ The problem has not been given adequate attention by proponents of the problem-solving court model.⁴⁷ The conflict can and should be prevented by a blanket prohibition against team members representing program participants.⁴⁸ This seemed to be the practice in Wisconsin communities, even though it had not evolved into a clear and unequivocal policy.⁴⁹

43. See MODEL RULES OF PROF'L CONDUCT R. 1.6 (2010).

44. See *id.* R. 1.2(a).

45. See *id.* R. 1.7–10.

46. *Id.* R. 1.7(a)(2); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-3.5(b) (Proposed Revisions 2009).

47. See *supra* note 16.

48. At least one treatment court model in an adjoining state involved a single defense attorney as team member and counsel for all participants. This exposes counsel to the risk of multiple conflicts between the duty owed to each individual team member and the duty owed to the team, as well as conflicts between individual team members. In a population of chronic alcohol and drug abusers, it is neither uncommon for participants to have knowledge of the violations of other participants nor is it unusual for them to serve as sources of information. The potential conflicts for a single lawyer serving in these multiple roles are manifest and should be avoided.

49. This separation would be difficult in smaller communities with a limited defense bar. If separation of roles is not possible, ethics rules require either that the team member recuse herself from cases involving current or former clients, or that the participant make an informed written waiver of the conflict. MODEL RULES OF PROF'L CONDUCT R. 1.10 (2010).

Defense counsel's status as a team member in the community where she practices could raise other ethical issues as well. In Wisconsin, all defense team members were public defenders. On several occasions, they knew a participant as a former or current agency client. If they shared knowledge about that participant with the team, they were disclosing client confidences.⁵⁰ If they withheld relevant information, they were not honoring their commitment to the team. An ethical violation could only be avoided by seeking a waiver of confidentiality from the participant.

Given the rule of imputed disqualification,⁵¹ some action would be necessary even if the team member was not familiar with the former agency client's case. Under Model Rule 1.10 and state variants of the Rule, the conflict of one firm member is imputed to all firm members.⁵² A public defender agency would seem to be a firm within the meaning of the rules. In the context of problem-solving courts, this means that if any assistant public defender is conflicted out of a case, all others in her office would be as well. The strictest interpretation of the rule would mean that no public defender could serve as a team member if any participant was ever represented by someone in the same office. The rigidity of this rule in other contexts has led to a call for exceptions that would allow conflicted attorneys to be screened off from involvement in the case giving rise to the conflict.⁵³

Whether conflict screening should be allowed has been a divisive issue within the ABA and state ethics committees, with more than twenty distinct responses in different jurisdictions.⁵⁴ By way of illustration, Wisconsin has a narrow screening provision that applies in very narrow circumstances and would not resolve the conflict between a public defender functioning as a treatment team member when colleagues represent or have represented treatment court participants.⁵⁵ Whether screening would be a viable solution to conflict problems would require examination of the particular jurisdiction's screening rules. If screening were permitted, the lawyer could continue as a team member even if the conflicted former agency client objected.

If screening were not possible, another option would be to require that the participant waive any objections to the team member's presence

50. Model Rule 1.6 protects all "information" related to the representation and imposes no time limit on the duty of confidentiality. MODEL RULES OF PROF'L CONDUCT R. 1.6. Unless some form of consent to disclosure were obtained, it would be inappropriate for the public defender team member to share past knowledge about a participant.

51. *See id.* R. 1.10.

52. *Id.*

53. *See generally* George A. Kuhlman, *Follow the Middle Road*, A.B.A. J., May 2009.

54. ABA Comm. on Ethics & Prof'l Responsibility, Recommendation 109 (2009), available at http://americanbar.org/content/dam/aba/migrated/leadership/2009/midyear/daily_journal/Adopted109.authcheckdam.doc.

55. WIS. SUP. CT. R. 20:1.10 (2011).

as a condition of participation in treatment. Such waivers need not be completely open ended. They could provide some agreed upon limit on disclosure or screening in return for a waiver of conflict and confidentiality protections.⁵⁶ The waiver would have to be in writing, signed by the participant.⁵⁷

A final response to conflict issues would be to require the defense counsel team member to recuse herself from cases involving conflicts. This would change the team dynamic and remove a defense voice from team deliberations but would avoid the ethical problem.

The manner in which cases are staffed in problem-solving courts also presents the issue of ex parte communications with the court. Model Rule 3.5 prohibits an attorney from having ex parte contacts with the court.⁵⁸ The text of the Rule does not limit its reach to representation of clients as do certain other rules.⁵⁹ As a consequence, the Rule appears to prohibit contacts by the attorney team members—both the public defender and the prosecutor—with the judge in the absence of the participant or her lawyer, regardless of how one envisions the roles of the attorney team members. The most obvious solution would be to require, as a condition of program involvement, participant consent to communications for the purpose of team meetings.⁶⁰

There are similarities between the defense attorney member of a planning or oversight committee and an attorney team member in a problem-solving court. In a sense, both act as “officer[s] of the legal system and public citizen[s] having special responsibility for the quality of justice.”⁶¹ Neither role inherently involves representation of a client. However, the defense attorney team member participates in real cases with real clients and makes real decisions that could be adverse to a current or former client. This distinction makes constructing the team member’s role complex and fraught with ethics questions. The Model Rules provide a path through the thicket, even if it is not the clearest or most direct path. The proposed Defense Function Standards do not acknowledge this role and, as a consequence, do not provide useful commentary on how it might be structured or separated from the other roles defense counsel may play.⁶²

56. MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(4) (2010). The proposed Defense Function Standards contain conflict of interest provisions that somewhat parallel those of the Model Rules. See STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-1.4 to 4-3.5 (Proposed Revisions 2009). They add little to the task of avoiding conflicts of interest for the problem-solving court team member.

57. See MODEL RULES OF PROF’L CONDUCT R. 1.7(b)(4).

58. *Id.* R. 3.5

59. See, e.g., *id.* R. 4.2, 4.3.

60. Another view expressed is that the judge is not acting as a “court” at team meetings, and thus, the Rule would not apply to these meetings.

61. MODEL RULES OF PROF’L CONDUCT pmbl. ¶ 1 (2010).

62. Caution suggests it would also be best if the defense attorney team member did not see

IV. DIFFERENT ROLES: THE LAWYER REPRESENTING INDIVIDUAL CLIENTS IN COMMUNITIES WITH PROBLEM-SOLVING COURTS

A fundamental and well-founded defense objection to problem-solving courts is that defense counsel should not be forced to embrace a collaborative role that may be antithetical to the client's wishes. A second objection is systemic in nature: that treatment is improperly purchased at the cost of abandoning nearly all traditional procedural safeguards enjoyed by the accused.

Separation of the roles of defense counsel, as proposed here, provides an answer to the first objection, which is a legitimate concern in jurisdictions that have sought to combine the roles either for fiscal reasons or because of a failure to carefully consider the different responsibilities that inhere in each role.

The second objection reflects an overly simplistic view of advocacy, failing to take into account that the dynamics of a treatment court require a very different type of presence than a contested trial or hearing—an alternative approach to advocacy that is discussed later in this Part. The objection also fails to acknowledge that when a client participates in treatment, she has chosen this path and rejected litigation, a choice that is hers to make.

The advent of problem-solving, or treatment, courts changes the context but not the nature of defense counsel's responsibilities to the client. Unchanged are the responsibilities to protect client confidences,⁶³ to provide competent representation, including investigation of the facts and law,⁶⁴ and to present an informed assessment of the case,⁶⁵ enumerating the client's choices and the likely consequences of each.⁶⁶

herself as attorney for the team. This would avoid another potential ethical problem: contact with represented persons without the consent of their lawyer. Model Rule 4.2 prohibits an attorney "representing a client" from contacting with a person known to be represented in the same matter. MODEL RULES OF PROF'L CONDUCT R. 4.2 (2010). This Rule could be violated if the team member were viewed as representing the team, the interests of the team and the participant were potentially adverse, the treatment court participant continued to be represented by separate counsel, and there was contact between the team member and the participant at the court hearing. This problem is avoided if the team member does not act as attorney for the team or for any participant. It would also be good practice for the defense attorney team member to explain her role to a participant—especially that she is not a lawyer for the participant or the team—whenever there is contact between the two. This could go far in avoiding the risk of confusion regarding the relationship between the public defender team member and program participants.

63. *Id.* R. 1.6.

64. *Id.* R. 1.1, 1.3.

65. *Id.* R. 1.2, 1.4.

66. The proposed contours of effective representation when treatment is an option find support in the proposed Defense Function Standards. For example, Standards 4-5.1 and 4-5.4 emphasize the importance of a thorough investigation to enable counsel to discuss all aspects of the case adequately with his client. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-5.1, 4-5.4 (Proposed Revisions 2009). This may involve treatment, *id.* § 4-6.1, and the need to engage experts, *id.* § 4-4.3.

At the early stages of any case, counsel needs sufficient time to investigate and to consult with the client.⁶⁷ This means that problem-solving courts must be structured to allow a reasonable time for counsel to obtain discovery, to explore whether the government's case is provable, to determine whether viable defenses exist or whether evidence may be subject to suppression, and to discuss her findings and conclusions with the client.⁶⁸

Informing a client of her options and the potential risks and benefits of each are among the most important responsibilities of any lawyer in any type of case. In the context of problem-solving courts, there appear to be at least three components to the consultation: (1) a thorough assessment of the strength of the state's case and the possibility of success in contesting the charges, (2) a candid and informed discussion about the client's substance abuse problem and commitment to confronting it, and (3) a clear presentation of precisely what the treatment court experience would involve on a day-to-day basis—the program requirements, what procedural rights would be waived, available charge or sentence concessions, and the consequences of failure.

Making sure the client's decision is truly informed may be counsel's most important responsibility in this type of case, because the option is so different from traditional choices and can involve extraordinary demands upon the client, albeit with the chance for extraordinary benefits. Even if counsel is predisposed against the problem-solving court model, as were several attorneys interviewed by this Author, it would be inappropriate not to present this option fully and accurately to the client.⁶⁹ If defense counsel has satisfied this responsibility, and the client understands her options, her informed choice controls the direction of the case, and defense counsel's contrary preferences become moot.⁷⁰ Of course, if the choice is to reject treatment, representation will follow a traditional trajectory.

A remaining issue is the proper role of counsel after the client is admitted to treatment, or, for that matter, if counsel should have any role at all. As noted earlier, when admission to treatment followed conviction and was part of a probation sentence, most Wisconsin attorneys believed their representation was over, even as the demands on the client were just beginning. This view is not without support. Rare is the case where

67. *See id.* § 4-4.1.

68. Inadequate time to investigate was not a problem in Wisconsin, largely due to waiting lists for entry into treatment. It may be that a vocal defense presence at the planning stage can help to develop procedures to accommodate these legitimate concerns and to obviate the need to raise them in individual cases.

69. *See* STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION §§ 4-5.1, 4-6.1 (Proposed Revisions 2009).

70. *See* MODEL RULES OF PROF'L CONDUCT R. 1.2 (2010); STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-5.2 (Proposed Revisions 2009).

an offender sentenced to jail or probation—even with demanding conditions—enjoys the continued involvement of counsel to mediate issues with the jailor or probation agent. Does the fact that the problem-solving model involves continued court involvement rather than simply a custodian or probation agent change the responsibilities of defense counsel? Implicit in some of the criticisms of problem-solving courts is the assumption that counsel has a continuing responsibility to the client until she either graduates from treatment or is removed, and the case is resolved by other means.⁷¹ There is no clear authority imposing this duty—particularly in the postconviction context—and there is a reasonable basis to conclude that no such duty exists.⁷²

Nonetheless, even if not statutorily or constitutionally required, continued defense counsel involvement could have value if counsel's presence effectively responds to the unique characteristics and structure of problem-solving courts. In traditional litigation, the attorney stands between the client and the state. The attorney speaks for her client and asserts procedural protections to prevent the client from making admissions of culpable conduct. In contrast, if the client has agreed to treatment, she has also agreed to be candid and forthright, to admit to relapses and missteps, and ultimately, to be accountable for the choices she has made. Interposing defense counsel between the client and the court or treatment team to frustrate this form of accountability is irreconcilable with the philosophy of treatment as well as with the agreement the client made in accepting treatment. A traditional approach to advocacy could do the client more harm than good.

This is not to say that there is no productive role for counsel to play. She may work to ensure a fair admission process and a treatment contract geared to her client's needs.⁷³ She can prepare the anxious or

71. Implicit in the duty to provide competent representation is a responsibility to see the case through until its conclusion. MODEL RULES OF PROF'L CONDUCT R. 1.1 (2010). The proposed Defense Function Standards address the continuing responsibilities of counsel. STANDARDS FOR CRIMINAL JUSTICE: DEFENSE FUNCTION § 4-1.3 (Proposed Revisions 2009). Of course, in the new world of problem-solving courts, there are differing views of when a case is concluded.

72. The Sixth Amendment right to counsel has been interpreted to apply when one is accused of a crime and faced with a "critical stage" of the proceeding. *See, e.g.,* WAYNE R. LAFAVE ET AL., CRIMINAL PROCEDURE 598-600 (5th ed. 2009). Although the initial sentencing hearing is deemed a critical stage, and due process has been interpreted as requiring the assistance of counsel in probation revocation proceedings, there is scant discussion in case law or literature of whether the regular court appearances required in problem-solving courts should be viewed as "critical stages" of the proceeding. *Id.*

73. All treatment court participants were required to sign a written contract. Counsel would do well to review the contract, to seek modifications if appropriate and possible, and to make sure the client understands to what she is agreeing. Some counties anticipated the involvement of defense counsel and included a signature line for defense counsel. Others did not. There were wide variations in the information included in the contract—some thoroughly describing all aspects of the program and others providing a much more abbreviated document. It would seem wise to err in favor of detail. Presumably if counsel had thoroughly advised the client beforehand, the contract would simply

inarticulate client for her regular court appearances. She can bring important facts and concerns to the attention of the team. She can work to make sure the testing processes and procedures are not prone to error; and, if they are, she can bring her concerns to the attention of the court and treatment team. She can remain a continuing source of support and encouragement for the client who is struggling to overcome her addiction. These actions can involve out-of-court contact with the client or a measured presence at team meetings and court hearings.

Continuing involvement can also ensure that the attorney is aware of the client's progress and will be adequately informed should the need arise to defend against a claimed rule violation, if the client chooses to leave the program or is involuntary expelled. The length and duration of defense counsel's obligation to a client in treatment is one of the important unresolved issues in the problem-solving court model.

CONCLUSION: WISCONSIN EFFORTS TO REDEFINE ROLES AND BEYOND

From the earliest stages, Wisconsin problem-solving team members acknowledged that their responsibilities and relationships would be substantially different from a traditional adversary model. It seems that as one new question has been answered, two more have emerged. Nonetheless, Wisconsin actors continue to work collaboratively to balance a problem-solving approach with traditional ethical responsibilities and the requirements of due process. Their early efforts did not draw clear distinctions between the various roles of defense counsel in treatment courts.⁷⁴ Missteps were made. At the same time,

provide another review of matters previously discussed.

74. For example, the initial Memorandum of Understanding for the Eau Claire County Drug Court Program explained the defense role as follows:

The Public Defender's Office

Shall assign a lawyer who will provide the following services:

1. Attend team meetings as necessary
2. The public defender or private defense attorney will make referrals to the drug court team after explaining the nature, purpose, and rules of drug court
3. The public defender or private attorney will encourage the participants to be truthful with the judge and treatment staff since admitting drug or alcohol use in court will not be the basis of new criminal charges
4. The public defender will be an active member of the drug court treatment team
5. The public defender will review the client's progress in treatment and advocate for fair process when a client is facing sanctions or termination
6. Provide representation for the participant in termination proceedings if eligible
7. The public defender will be a community advocate for the Drug Court Program

EAU CLAIRE CNTY. DRUG COURT PROGRAM, MEMORANDUM OF UNDERSTANDING (2007) (on file with the Author). Note that items 2, 3, 5, and 6 address the role of counsel as attorney for a client. Items 1, 4, and 7 speak to defense counsel as a member of the treatment team.

Similarly, the St. Croix County Drug Court Program Policies and Procedures Manual

they have shown continued good faith, cooperation, an openness to critically examine their own actions, and the effectiveness of a problem-solving approach to drug and alcohol abuse. Their commitment to this approach is practical rather than theoretical—as long as it helps clients for whom traditional approaches had little to offer, it will continue. If, over time, this approach proves unsuccessful, I expect it will be abandoned, or at least refined to apply only to the cases with the greatest chance of success. Wisconsin practitioners have not only worked together, but have endeavored to share their experiences as part of a statewide and even national dialogue.

From these efforts, the distinct roles described here have evolved. The tendency of both proponents and critics to view the role of counsel in problem-solving courts as one dimensional makes analysis of the new and often complex ethical issues presented by problem-solving courts unnecessarily difficult and problematic. A better approach is to examine exactly what defense attorneys do in communities with problem-solving courts in order to develop a taxonomy grounded in fact and experience—the Wisconsin approach—rather than a critique based on caricature or ideology. This is particularly so given the incredible variations and relative novelty of problem-solving courts. An analysis grounded in fact and experience is best suited to lead to the development of performance standards and ethical guidelines for defense counsel's work in and with problem-solving courts. Given the respect and guidance that has long been afforded the work of the ABA, discussion of these issues in one or more of the Criminal Justice Standards can make an invaluable contribution to this dialogue.

envision a slightly different, but also mixed, defense role:

Public Defender's Office/Defense Attorney

- Attend Team meetings as necessary
- Discuss pros and cons with potential participant before entering drug court
- Review cases for potential legal issues
- Discuss resolution of case with District Attorney before entering drug court
- Remain accessible to participant
- Advocate for fair process
- Maintain a non-adversarial role during Court proceedings
- Provide representation for the participant during termination proceedings if eligible

ST. CROIX CNTY. DRUG COURT PROGRAM, *supra* note 41. Here, items 1 and 7 focus on the public defender as team member. Item 6 presumably applies to the public defender as a member of the initial planning group and treatment team, and items 2, 3, 4, 5, and 8 focus on the public defender as attorney for a client.